Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. ..... 71 - 922

HERBERT J. COHN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Herbert J. Cohn, by his attorney, Joseph Brill, respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit, rendered December 17, 1971, affirming a judgment of conviction in the United States District Court for the Southern District of New York. The latter judgment had been rendered on August 16, 1971, after trial before Pollack, D. J., and a jury. The crimes of which petitioner was convicted were perjury and the obstruction of justice (18 U. S. Code Secs. 1621 and 1503 respectively). The indictment contained another perjury count, of which petitioner was acquitted. The sentence imposed on each count (concurrently) was imprisonment for one year and a fine of $2,500, with execution of sentence suspended except for sixty days, the remainder being a period of probation.

Opinion Below

A copy of the opinion of the Court of Appeals (by Kaufman, Circ. J.), affirming the judgment of conviction is appended hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on December 17, 1971.

The jurisdiction of the United States District Court was invoked as involving alleged violations of 18 U. S. Code Secs. 1621 and 1503.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. Code Sec. 1254.

Questions Presented for Review

Where the alleged perjurious testimony relates to events occurring more than seven years prior to the grand jury inquiry, so that any prosecution as to the subject-matter is barred by limitations, may the testimony still be deemed so material as to justify a prosecution for perjury?

Does the alleged giving of false testimony before a grand jury come within the purview of the statute relating to obstruction of justice?

Does the mere testimony of a handwriting expert on a collateral point constitute such corroboration as to sustain a perjury conviction?

Statement of Case

The background, as stated by the Government in its brief below, was simply this: "The grand jury, which heard the defendant testify on four different occasions under a

formal grant of immunity, was investigating possible corruption involving government and labor union officials." While testifying on April 29, 1970, petitioner is charged with having given false answers to some seven questions. In substance he stated that he had no recollection of and could not identify the handwriting on a certain envelope bearing a postmark of March 27, 1963 (384; subsequent numerical references relate to pages of the transcript). The Government's proof consisted of the testimony of one Herbert Itkin that petitioner had given him the envelope; and the contradicted statement of a handwriting expert that in his opinion part of the writing on the envelope was that of petitioner's wife.

Reasons for Allowance of Writ

1. The subject-matter of the grand jury inquiry (as specifically contained in the indictment herein) was outlawed by limitations. The essence of all the offense charged to petitioner and whereof he was convicted was his declaration of inability to recall or recognize a few words scribbled on an envelope more than seven years prior to his interrogation before the grand jury. Were it to be assumed that the notes were in some way significant, it is manifest that on the day of his testimony, namely, April 29, 1970, the grand jury could not lawfully indict any one in consequence of what was written (or even done) in 1963. With the exception of capital crimes, the limitation for federal prosecutions is five years. 18 U. S. Code Sec. 3282. Clearly, even if the note or memorandum contained (instead of its equivocal language) a forthright admission of larceny or bribery in violation of some pertinent federal law, and the grand jury was seeking to establish the identity of the writer, the false testimony of a witness that he did not recognize the writing, could not ground either a perjury or obstruction prosecution. Where any indictment for the original transaction is barred by limitations, any testimony

relating to it automatically becomes immaterial. The perjury statute (18 U. S. Code Sec. 1621) is limited to "material matter," and false testimony concerning matters not material to a grand jury's investigation cannot constitute perjury. *Rivers* v. *State*, 121 Fla. 887, 164 So. 544; *Bennett* v. *District Court*, 81 Okla. 351, 162 P. 2d 561. Consequently, matters occurring prior to the limitations period, however cogent, become immaterial in any prosecution. *United States* v. *Silverman* (C. A. 2) 248 F. 2d 671. The Government's justification for the remote inquiry was that the answers "would have surely provided the grand jury with necessary and valuable leads." We submit that the approval of such procedure would permit the scope of any alleged investigation to extend back into the most distant past and sanction a prying into matters wholly foreign to the grand jury's proper functions.

2. The indictment's allegations under count 3 (obstruction of justice) are identical with those of count 2 (perjury). The acts imputed to petitioner may not possibly come within the ambit of 18 U. S. Code Sec. 1503. That law's very caption ("Influencing or injuring officer, juror or witness generally") is indicative of its scope, and the conclusion is confirmed by a precise study of every word. Various acts are enumerated, to wit, threatening or intimidating a witness in a federal court or before a federal magistrate; threatening or intimidating a grand or petit juror; injuring a party or witness on account of his testifying; injuring a juror, magistrate or officer on account of the performance of his official duties; and, finally, renders criminal the act of one who "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Nothing in the statute contains the slightest of a legislative intent to include perjury. In order to be guilty of

obstruction of justice, a defendant must be shown to have done so corruptly, by threats or force or by a threatening letter or communication, and most certainly not by the giving of false testimony. A recent decision specifically holds that neither the language of the statute nor its purpose makes the giving of false testimony an obstruction, or an attempt to obstruct justice. *United States* v. *Essex* (C. A. 6) 407 F. 2d 214. The Government virtually admitted that its position was not sustained by the *Essex* decision, saying with respect thereto in its brief below, "There the Court rejected the broad reading of Section 1503 adopted in this Circuit." In the instant case the Court of Appeals reiterated views previously expressed in *United States* v. *Alo* (C. A. 2) 439 F. 2d 751, and thus we are confronted with a clear conflict between two circuits—a classic situation calling for final authoritative review.

We may add that the instructions to the jury herein, to the extent that they related to the obstruction count, purported to read the statute "in pertinent part" (405-407) and completely omitted its very beginning, namely, "Whoever corruptly influences, obstructs or impedes or endeavors to influence, obstruct or impede the due administration of justice commits an offense," adding, however, "I also charge you as a matter of law that obstruction of justice includes concealing from a grand jury information relevant and germane to its functions." Wholly apart from such language's extension of the statute to transactions not within its language or intent, it is obvious that an authoritative direction to the jury to evaluate a charge of obstructing justice in conjunction with the perjury count necessarily affected impartial consideration of the latter. It is not asking too much to require that a defendant charged with perjury is entitled to a trial on that issue alone, free from the concomitant prejudice inherent in a characterization of the matter as an obstruction of justice.

3. The Government's proof fell far short of the required corroboration essential to establish the commission of perjury. Indeed, it is our contention that there was an utter lack of corroboration. The law is well established that in the federal courts the alleged false statements must be proved either by the testimony of two independent witnesses, or by one witness plus independent corroborating evidence. *Paternostro* v. *United States* (C. A. 5) 311 F. 2d 294; *United States* v. *Neff* (C. A. 3) 212 F. 2d 29; *United States* v. *Rose* (C. A. 3) 215 F. 2d 617. This rule was recognized by the trial Court herein and included in the instructions (400). On the two counts on which petitioner was convicted the sole witness as to the delivery by petitioner of the envelope to Herbert Itkin was Itkin himself. We cannot forbear mentioning the type of individual with whom we are concerned at this point. The Government's sole material witness, Itkin, admitted having threatened F. B. I. agents (82); admitted being party to a hundred kickback deals running into millions of dollars (86-88); admitted numerous other criminal acts, including the conversion of clients' funds (88), bribery of public officials (89), the commission of perjury, for which at the time of the present trial he was under indictment (90), the filing of a false report (91), participation in the theft of several million dollars (93), making false affidavits and false tax returns (94-96), the misappropriation of escrow moneys (99) and trust funds (101) and numerous other misdeeds. Even the prosecutor could not forbear referring to him in summation as one who "freely admitted deals and bribes" and one who "became publicly known as an informant (377-378). Recently the New York Times referred on its first page (November 10, 1971) to "Herbert Itkin, the self-described Federal informant," and called him "the key figure in more than half a dozen major Federal cases prosecuted here over the last three years"—not all of which resulted

in convictions. If there has ever been an individual of whose character courts may take judicial notice, Itkin may well come within that category.

With such a witness as the mainstay of its case, the prosecution clearly had the burden of coming forward with another witness or independent corroborating proof. There was no other witness as to the dealings between petitioner and Itkin. All the Government could offer as supposed corroboration was the testimony of a handwriting expert, one Davis, who expressed the opinion that three words on the crucial exhibit (Govt. Ex. 7), namely "embezzlement," "indictment" and "O'Brien," were in the same handwriting as another paper written by petitioner's wife. However, he was unable (173) to reach a definite opinion as to "the remainder of the penciled script writing on this Government Exhibit 7." And the opinion of Davis was squarely contradicted by that of J. R. Haring, the prominent handwriting expert called by the defense (323-324). Even if it be assumed that the Davis opinion was quite correct, and that the words on the envelope were written by petitioner's wife, no distortion of reasoning could elevate such testimony to the status of corroboration of the charge that defendant was untruthful in testifying that he was unable to recognize the handwriting. A person who says he does not know whether a scrap of paper with which he is confronted was written by his wife seven years ago, is not shown to be committing perjury because some one is of the opinion that part of the paper is in the person's wife's handwriting. This piece of proof—the opinion of a handwriting expert—is so plainly remote and fragmentary, as not coming close to the law's requirement of corroboration. If such minutiae are to be invested with the dignity of corroboration, there is no limit to the peripheral and insignificant matters upon which reliance will be placed in the future, and we would in effect be abandoning the sound rule as to the minimal elements of proof of perjury.

While petitioner herein is naturally pursuing all remedies to exonerate him of wrongdoing, and in the strongest feeling of his complete innocence, which his counsel shares, the Court will appreciate that the case involves meritorious and certainly arguable questions of a kind likely to arise in other prosecutions and calling for authoritative disposition—especially in view of the contrary view expressed in another circuit. The issues are of a sort with which courts are likely to be concerned in future cases. Ultimate appellate review would be most helpful in furnishing sound guidelines to aid in the just resolution of similar controversies and to prevent injustice.

CONCLUSION

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated New York, N. Y., January 12, 1972.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals for the Second Circuit, Dated December 17, 1971

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 387—September Term, 1971.

(Argued December 14, 1971 Decided December 17, 1971)

Docket No. 71-1884

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HERBERT J. COHN,

Defendant-Appellant.

Before:

SMITH, KAUFMAN and MULLIGAN,

Circuit Judges.

KAUFMAN, *Circuit Judge:*

Herbert J. Cohn appeals from a conviction for committing perjury (18 U.S.C. §1621) and obstructing justice (18 U.S.C. §1503). We affirm.

The indictment charged that he gave "false and evasive" testimony before a federal Grand Jury.[1] Cohn argues that his perjury conviction must be set aside because his testimony was not material to the grand jury investigation and there was no independent corroboration of the testimony of the principal government witness. In addition,

[1] A third count charged Cohn with perjury unrelated to this Grand Jury testimony. He was acquitted on this count.

he urges that false and evasive testimony will not support a conviction for obstructing justice.

On April 29, 1969, Cohn appeared under a formal grant of immunity before a federal Grand Jury investigating possible corruption among government and labor union officials. Confronted with an envelope addressed to his son on which there were pencilled notes such as "indictment," "embezzlement," "5 Count GJ," and "Buffalino Father in Law," he gave the following pertinent answers in response to questions relating to the envelope:

> Q. Mr. Cohn, I show you what has been marked Grand Jury Exhibit 1 and ask you whether you can identify that and whether you have ever seen it before? A. I don't recall any of this. I recognize the envelope. It was addressed to my son. I recognize the handwriting addressing it to my son as coming from my mother. It must have been a birthday card or something.
>
> Q. Do you recognize the pencilled handwriting? A. There are several here.
>
> Q. Do you recognize any of them? A. Offhand—I can't say that I do.
>
> * * *
>
> Q. You never recall seeing that envelope? A. No. This is the first time I have seen it.
>
> Q. You are sure of that? A. I don't recall ever seeing this thing. I don't know where it comes from or what it is all about.
>
> Q. Does anything that is written on there refresh your recollection concerning anything you might know about? A. The only name that I see here, as I said, I knew was Buffalino. I can't make out this

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and I don't understand what the connection is, anyway.

Q. Well, aside from specific names, is there anything in the information that is written on there that would in any way jog your memory as to whether you know anything about what is written on there? A. I don't have any recollection of the envelope or any of this.

At trial, Herbert Itkin testified that Cohn was the middle man in late 1962 and early 1963 between himself and Morris Emmanuel, a Labor Department official, in an illegal scheme to obtain information concerning pending federal labor racketeering investigations. Cohn, according to Itkin, gave him the envelope in question and told him that the pencilled notes, written by his wife, contained the information he had received from Emmanuel. An FBI handwriting expert testified that some of the notes on the envelope were written by Cohn's wife and that others contained significant similarities to her handwriting. Cohn in his testimony at the trial denied that he had given the envelope to Itkin and reaffirmed his Grand Jury testimony.

We need not pause long in considering Cohn's challenge to the perjury conviction on the grounds that his testimony, relating as it did to events which had occurred prior to the limitations period, could not be a basis for indictment. He argues that as a matter of law it could not pertain to a "material matter."[2] The Grand Jury's scope of inquiry, however, is not limited to events which themselves may result in criminal prosecution, but is prop-

[2] One can be prosecuted for perjury only if he testifies falsely to "any material matter." 18 U.S.C. §1621.

erly concerned with any evidence which may afford valuable leads for investigation of suspected criminal activity during the limitations period. "[T]he test of materiality is whether the false testimony has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation." *United States* v. *Stone*, 429 F.2d 138, 140 (2d Cir. 1970). Here, by concealing information relating to Emmanuel's suspected unlawful dealings in 1962 and 1963, Cohn may have hindered an investigation into Emmanuel's subsequent activities as a Labor Department official.[3]

We also find lacking in merit Cohn's challenge to his conviction for perjury on the ground that the evidence did not satisfy the "two-witness rule." Perjury can be proven by two witnesses or by the testimony of one witness corroborated by independent evidence. *See, e.g., United States* v. *Manfredonia*, 414 F.2d 760, 764 (2d Cir. 1969); *United States* v. *Marchisio*, 344 F. 2d 653, 664 (2d Cir. 1965). Itkin's testimony was sufficiently corroborated by the testimony of the FBI handwriting expert and the inferences to be drawn from the contested notes on the envelope, as well as by the very possession of this envelope by Itkin.

Cohn also argues that his testimony, even if it concealed information relevant and germane to the Grand Jury's functions,[4] will not support a conviction under 18 U.S.C. 1503 for obstructing justice. Although the specific provisions of 1503 relate to tampering, by corruption, threats

[3] Emmanuel continued as an official of the Labor Department until 1968.

[4] The district judge charged as a matter of law "that obstruction of justice includes concealing from a grand jury information relevant and germane to its functions."

or force, with sources of evidence extrinsic to the actor, the final all-embracive language proscribes all conduct which "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, . . ." Cohn would have us limit the scope of this clause only to situations where the defendant interferes with other witnesses or documentary evidence. We rejected this argument under 18 U.S.C. §1505, which tracks the language of §1503 in the context of administrative proceedings, in *United States* v. *Alo*, 439 F.2d 751, 754 (2d Cir.), *cert. denied*, 40 L.W. 3164 (Oct. 12, 1971):

> So restrictive a gloss, however, would produce the anomalous result that concealing information recorded in one's papers would constitute, as the appel-

[5] 18 U.S.C. §1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> lant concedes, an offense under §1505, but concealing data recorded in one's memory would not. No rational basis for differentiating between these two types of evidence has been suggested to us, and without a clear statement of contrary Congressional intent we cannot attribute such an arbitrary distinction to the legislature. Like the specific provisions which precede it [*e.g.*, §1503], §1505 deals with the deliberate frustrations through the use of corrupt or false means of an agency's attempt to gather relevant evidence. The blatantly evasive witness achieves this effect as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.
>
> Alo objects that such an interpretation of §1505 will open an avenue for wholesale evasion of the so-called "two-witness rule" to which perjury convictions must conform. We disagree. It is true, that to convict Alo the jury had to conclude that he was lying when he professed loss of memory, but the gist of his offense was not the falsehood of his statements, but the deliberate concealment of his knowledge.

We see no reason to depart from this reasoning.

The judgment of conviction is affirmed.